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Nos. 16-1436 & 16-1540

In the Supreme Court of the United States

DONALD J. TRUMP, ET AL., PETITIONERS

v.

INTERNATIONAL REFUGEE ASSISTANCE PROJECT, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

DONALD J. TRUMP, ET AL., PETITIONERS

v.

HAWAII, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE STATES OF TEXAS, ALABAMA, ARIZONA, ARKANSAS, FLORIDA, KANSAS, LOUISIANA, MISSOURI, NORTH DAKOTA, OHIO, OKLAHOMA, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, AND WEST VIRGINIA, AND GOVERNOR PHIL BRYANT OF THE STATE OF MISSISSIPPI AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

Page

Interest of amici curiae 1

Summary of argument 2

Argument 5

I. Plaintiffs cannot overcome the exacting standard that applies to discriminatory-purpose challenges to facially neutral government actions 5

A. An exacting standard insulates government action from being deemed a discriminatory pretext absent the clearest proof to the contrary 6

B. The Order here, which classifies aliens by nationality and reflects national-security concerns, cannot be deemed a pretext for a religious test. 9

II. The Executive Order complies with the INA, so it also receives "the strongest of presumptions" of validity because it is within *Youngstown*'s first category as executive action pursuant to power delegated expressly by Congress. 14

III. The constitutional provisions invoked by plaintiffs do not extend extraterritorially, nonresident aliens abroad possess no constitutional rights regarding entry into this country, and the Executive Order provides all process that could possibly be due. 25

Conclusion 36

TABLE OF AUTHORITIES

Cases:

Abourezk v. Reagan,
785 F.2d 1043 (D.C. Cir. 1986) 21
Am. Mfrs. Mut. Ins. Co. v. Sullivan,
526 U.S. 40 (1999) 29
Arizona v. United States,
567 U.S. 387 (2012) 1, 23
Azizi v. Thornburgh,
908 F.2d 1130 (2d Cir. 1990) 29
Boumediene v. Bush,
553 U.S. 723 (2008) ..... *passim*
City of Columbia v. Omni Outdoor Advert., Inc.,
499 U.S. 365 (1991) 7
Crosby v. Nat'l Foreign Trade Council,
530 U.S. 363 (2000) 23
Dames & Moore v. Regan,
453 U.S. 654 (1981) 14, 22
De Avilia v. Civiletti,
643 F.2d 471 (7th Cir. 1981) 29
Demore v. Kim,
538 U.S. 510 (2003) 31
Flemming v. Nestor,
363 U.S. 603 (1960) 8
Fletcher v. Peck,
6 Cranch 87 (1810) 7, 8
Haitian Refugee Center v. Gracey,
809 F.2d 794 (D.C. Cir. 1987) 16, 26

Harisiades v. Shaughnessy,
342 U.S. 580 (1952) 13
Hawaii v. Trump,
859 F.3d 741 (9th Cir. 2017) 17, 18, 21, 22
No. 1:17-cv-50 (D. Haw. Mar. 15, 2017) 27
Holder v. Humanitarian Law Project,
561 U. S. 1 (2010) 7, 18
Int'l Refugee Assistance Project v. Trump,
857 F.3d 554 (4th Cir. 2017) (en banc) 20
No. 8:17-cv-361 (D. Md. Mar. 10, 2017) 27
Johnson v. Eisentrager,
339 U.S. 763 (1950) 26
Kerry v. Din,
135 S. Ct. 2128 (2015) 24, 33, 34
Kleindienst v. Mandel,
408 U.S. 753 (1972) ..... *passim*
Knoetze v. U.S. Dep't of State,
634 F.2d 207 (5th Cir. 1981) 30
Lamont v. Woods,
948 F.2d 825 (2d Cir. 1991) 28
Landon v. Plasencia,
459 U.S. 21 (1982) 26, 29, 31, 32
Legal Assistance for Vietnamese Asylum Seekers v. Dep't of State, Bureau of Consular Affairs,
104 F.3d 1349 (D.C. Cir. 1997) 29
Louhghalam v. Trump,
230 F. Supp. 3d 26 (D. Mass. 2017) 29
Mathews v. Diaz,
426 U.S. 67 (1976) 9, 10, 13

McCleskey v. Kemp,
481 U.S. 279 (1987) 8
McCreary Cty. v. ACLU,
545 U.S. 844 (2005) 2, 9
Miller v. Johnson,
515 U.S. 900 (1995) 6
Pers. Adm'r of Mass. v. Feeney,
442 U.S. 256 (1979) 8, 14
Posadas v. Nat'l City Bank of N.Y.,
296 U.S. 497 (1936) 19
Reno v. Am.-Arab Anti-Discrimination Comm.,
525 U.S. 471 (1999) 6, 13, 17, 18
Republican Party of Minn. v. White,
536 U.S. 765 (2002) 13
Sale v. Haitian Ctrs. Council, Inc.,
509 U.S. 155 (1993) ..... *passim*
Shaughnessy v. United States ex rel. Mezei,
345 U.S. 206 (1953) 15
Smith v. Doe,
538 U.S. 84 (2003) 8
Sunday Lake Iron Co. v. Wakefield Twp.,
247 U.S. 350 (1918) 6
Swarthout v. Cooke,
562 U.S. 216 (2011) 29
Tenney v. Brandhove,
341 U.S. 367 (1951) 9, 10
Texas v. United States,
809 F.3d 134 (5th Cir. 2015) 23
Trump v. Int'l Refugee Assistance Project,
137 S. Ct. 2080 (2017) 2, 4, 7, 25, 35

U.S. Dep't of Labor v. Triplett,
494 U.S. 715 (1990) 5, 6
United States v. Chem. Found., Inc.,
272 U.S. 1 (1926) 6
United States v. Verdugo-Urquidez,
494 U.S. 259 (1990) 26
United States ex rel. Knauff v. Shaughnessy,
338 U.S. 537 (1950) 24
Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.,
429 U.S. 252 (1977) 7, 8
Washington v. Davis,
426 U.S. 229 (1976) 8
Washington v. Trump,
847 F.3d 1151 (9th Cir. 2017) 29, 30, 32, 33
858 F.3d 1168 (9th Cir. 2017) 7, 13
Yick Wo v. Hopkins,
118 U.S. 356 (1886) 26
Youngstown Sheet & Tube Co. v. Sawyer,
343 U.S. 579 (1952) 3, 14, 22, 23
Zadvydas v. Davis,
533 U.S. 678 (2001) 26, 31
Zivotofsky ex rel. Zivotofsky v. Kerry,
135 S. Ct. 2076 (2015) 23

Constitutional provisions, statutes, and rules:

U.S. Const.:
art. I, § 9, cl. 2 27
amend. I 3, 27, 28
amend. V ..... *passim*

Immigration and Nationality Act, 8 U.S.C.:
§ 1101(a)(4) 19
§ 1101(a)(13)(A) 19
§ 1101(a)(15)-(16) 19
§ 1101(a)(42) 33
§ 1151(a)-(b) 19
§ 1152(a)(1)(A) 19, 20
§ 1153(c) 10
§ 1157 21
§ 1157(a) 33
§ 1157(a)(2) 16
§ 1157(a)(3) 28
§ 1157 note 27
§ 1157(b) 22
§ 1158 32
§ 1158(a) 33
§ 1158(a)(1) 33
§ 1158(c)(1) 33
§ 1181 19
§ 1181(a) 19
§ 1181(c) 20, 33
§ 1182(a) 19
§ 1182(a)(3) 21
§ 1182(a)(9)(B) 31
§ 1182(f) ..... *passim*
§ 1184 19
§ 1185(a)(1) 15
§ 1187(a)(12) 10
§ 1187(a)(12)(A)(i)(III) 11
§ 1201(h) 19
§ 1201(h)-(i) 30
§ 1201(i) ..... *passim*

§ 1231 note 33
§ 1254a(a)(1) 9
§ 1255 note 10
10 U.S.C. § 801 note 12
50 U.S.C. § 1541 note 12
Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) 12
Department of State, Foreign Operations, and Related Programs Appropriations Act, 2016, Pub. L. No. 114-113, div. K, 129 Stat. 2705 (2015) 28
Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, 118 Stat. 3638 32
National Defense Authorization Act for Fiscal Year 2016, Pub. L. No. 114-92, 129 Stat. 726 (2015) 12
22 C.F.R.:
§ 41.122 19
§ 42.82 19
Sup. Ct. R. 37.6 1

Miscellaneous:

Executive Order 13,780, 82 Fed. Reg. 13,209 (Mar. 9, 2017) ..... *passim*
Letter of Bob Goodlatte, Chairman, H. Comm. on the Judiciary, to Barack Obama, President of the United States of America (Oct. 27, 2015) 12
H. Comm. on Homeland Sec., 114th Cong., *Nation's Top Security Officials' Concerns on Refugee Vetting* (Nov. 19, 2015) 11

H. Comm. on Homeland Sec., 114th Cong., *Syrian Refugee Flows: Security Risks and Counterterrorism Challenges* (Nov. 2015) 12

H. Comm. on Homeland Sec., 114th Cong., *Terror Threat Snapshot: The Islamist Terror Threat* (Nov. 2015)..... 12

Muslim Population by Country: 2010, Pew-Templeton Global Religious Futures Project (last visited Aug. 17, 2017), http://www.globalreligiousfutures.org/religions/muslims 10

Presidential Proclamation No. 5377, 50 Fed. Reg. 41,329 (Oct. 10, 1985) 21

Presidential Proclamation No. 5517, 51 Fed. Reg. 30,470 (Aug. 26, 1986) 20

The White House, *Report on the Legal and Policy Frameworks Guiding the United States' Use of Military Force and Related National Security Operations* (Dec. 2016)..... 12

INTEREST OF AMICI CURIAE

Amici curiae are the States of Texas, Alabama, Arizona, Arkansas, Florida, Kansas, Louisiana, Missouri, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, and West Virginia, and Governor Phil Bryant of the State of Mississippi.[1] The States have a significant interest in protecting their residents' safety. But the States and their elected officials must generally rely on the federal Executive Branch to restrict or set the terms of aliens' entry into the States for public-safety and national-security reasons, pursuant to the laws of Congress. *See Arizona v. United States*, 567 U.S. 387, 409-10 (2012). And the Immigration and Nationality Act (INA) gives the Executive significant authority to suspend aliens' entry into the country. Amici therefore have a substantial interest in the alleged existence of restrictions on the President's ability to suspend the entry of aliens as he determines is in the national interest.

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[1] Pursuant to Supreme Court Rule 37.6, amici state that no counsel for any party authored this brief, in whole or in part, and no person or entity other than amici contributed monetarily to its preparation or submission. The parties' consents to the filing of this brief have been filed with the Clerk.

SUMMARY OF ARGUMENT

The courts below issued remarkable injunctions of the President's Executive Order temporarily suspending the entry of specified classes of nonresident aliens and limiting the admission of refugees. The injunctions extend even to "foreign nationals abroad who have no connection to the United States at all." *Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2088 (2017) (per curiam) (*IRAP*). That said, the injunctions are improper in their entirety because they issued despite multiple longstanding doctrines limiting the availability of judicial remedies for disagreement with policy decisions like the Executive Order here.

I. The Fourth Circuit grievously erred in sustaining a discriminatory-purpose challenge to the Executive Order based on purported religious animus.

A. The Court has long accorded facially neutral government actions a presumption of validity and good faith, so those actions can be invalidated under a discriminatory-purpose analysis only if there is the clearest proof of pretext. This longstanding, exacting standard for judicial scrutiny of government motives has been recognized by this Court in multiple types of constitutional challenges. *See infra* Part I.A. This limit respects institutional roles by precluding courts from engaging in a tenuous "judicial psychoanalysis of a drafter's heart of hearts." *McCreary Cty. v. ACLU*, 545 U.S. 844, 862 (2005). *See* Pet. Br. 70-78.

B. Plaintiffs cannot satisfy this Court's exacting standards for showing that the Executive Order is pretext masking a religious classification. The Order classifies aliens according to nationality based on concerns

about the government's ability to adequately vet nationals of six covered countries who seek entry. Not only that, but these six countries covered by the Order were previously identified by Congress and the Obama Administration, under the visa-waiver program, as national-security "countries of concern." The Order is therefore valid, as it provides a "facially legitimate and bona fide reason" for exercising the President's 8 U.S.C. § 1182(f) national-security and foreign-affairs powers to restrict entry. *Kleindienst v. Mandel*, 408 U.S. 753, 770 (1972). *See* Pet. Br. 62-69.

II. The Ninth Circuit also erred by finding that the President lacked statutory authority to issue the Executive Order. *See* Pet. Br. 38-62. The Executive Order comports with Congress's scheme that grants the President sweeping power, under 8 U.S.C. § 1182(f), to restrict alien entry into the United States. Thus, in addition to the presumptions of constitutionality and good faith that apply to this government action, the Executive Order must also be further accorded "the strongest of presumptions and the widest latitude of judicial interpretation," because it is in *Youngstown*'s first zone of executive action pursuant to congressionally delegated power. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

III. Nor could the injunctions be justified under a procedural-due-process theory turning on whether a nonresident alien abroad has a sufficient connection to the United States. *See* Pet. Br. 6-7, 67-69.

The Constitution does not apply extraterritorially to nonresident aliens abroad seeking entry. So neither the Fifth Amendment nor the Establishment Clause extend

to the aliens covered by the Executive Order. Indeed, this Court has specifically recognized that there is no "judicial remedy" to override the Executive's use of its delegated 8 U.S.C. § 1182(f) power to deny classes of nonresident aliens entry into this country. *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 188 (1993).

Even assuming the Constitution applies to nonresident aliens abroad seeking entry, the Executive Order fully complies with any possible due-process requirements. The Order publicly sets forth facially valid, bona fide national-security grounds for restricting entry to a class of nonresident aliens abroad. *See* Pet. Br. 65-69.

At an absolute minimum, constitutional rights do not extend extraterritorially to "foreign nationals abroad who have no connection to the United States at all." *IRAP*, 137 S. Ct. at 2088. The Order therefore cannot be enjoined as applied to foreign nationals who lack a "credible claim of a bona fide relationship with a person or entity in the United States"—such as "a close familial relationship," or a relationship with an entity that is "formal, documented, and formed in the ordinary course, rather than for the purpose of evading [the Executive Order]." *Id.*

Ultimately, the lower courts' injunctions of the Executive Order are contrary to law. These injunctions deny the federal government—under a statutory regime crafted by the people's representatives in Congress—the latitude necessary to make national-security, foreign-affairs, and immigration-policy judgments inherent in this country's nature as a sovereign. The Court should reverse.

ARGUMENT

I. Plaintiffs Cannot Overcome the Exacting Standard that Applies to Discriminatory-Purpose Challenges to Facially Neutral Government Actions.

As this Court has recognized for years and in many different contexts, a discriminatory-purpose challenge to facially neutral government action faces an exacting standard. The Court has articulated this exacting standard in different ways, but the central principle in this well-established body of case law is that a facially neutral government action can be invalidated as pretext only upon the clearest proof. *See infra* pp. 6-9. This high standard for overriding government action by discerning a discriminatory purpose respects the "heavy presumption of constitutionality to which a carefully considered decision of a coequal and representative branch of our Government is entitled." *U.S. Dep't of Labor v. Triplett*, 494 U.S. 715, 721 (1990) (citation and quotation marks omitted); *see also* Pet. Br. 77-78.

That heavy presumption cannot be overcome by plaintiffs' arguments here, especially given the Executive Order's detailed national-security findings, the resonance of those findings in determinations of numerous federal officials, and the judicial deference owed to executive decisions in this context. *See* Executive Order 13,780 (EO) § 1(d)-(i), 82 Fed. Reg. 13,209, 13,210-12 (Mar. 9, 2017). The Fourth Circuit's analysis deeming the Executive Order pretext for a religious test discounts those weighty considerations, and it undermines the sound reasons for the exacting standard required to

invalidate facially neutral government action based on an alleged discriminatory purpose.

A. An exacting standard insulates government action from being deemed a discriminatory pretext absent the clearest proof to the contrary.

A discriminatory-purpose challenge to facially neutral government action faces an exacting standard under this Court's precedents: it requires the clearest proof of pretext.

1. This exacting standard for discriminatory-purpose challenges is just one application of the Court's general recognition that government action is presumed valid, *e.g.*, *Sunday Lake Iron Co. v. Wakefield Twp.*, 247 U.S. 350, 353 (1918); that government actors are presumed to act in good faith, *Miller v. Johnson*, 515 U.S. 900, 916 (1995); and that a "presumption of regularity" attaches to official government action, *United States v. Chem. Found., Inc.*, 272 U.S. 1, 14-15 (1926). These doctrines create a "heavy presumption of constitutionality." *Triplett*, 494 U.S. at 721.

And this presumption of constitutionality applies with particular force to the foreign-affairs and national-security determinations at issue here. *See Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 491-92 (1999) (*AADC*). After all, "[u]nlike the President and some designated Members of Congress, neither the Members of this Court nor most federal judges begin the day with briefings that may describe new and serious threats to our Nation and its people." *Boumediene v. Bush*, 553 U.S. 723, 797 (2008). Indeed, "the Government's interest in enforcing" the Executive Order's

travel restrictions "and the Executive's authority to do so" extend from the government's "interest in preserving national security[, which] is 'an urgent objective of the highest order.'" *IRAP*, 137 S. Ct. at 2088 (quoting *Holder v. Humanitarian Law Project*, 561 U. S. 1, 28 (2010)). The presumption of constitutionality is especially strong as to executive action regarding nonresident aliens abroad who seek entry to the country without existing ties to U.S. residents or entities, since the President's national-security powers are "undoubtedly at their peak when there is no tie between the foreign national and the United States." *Id.*

2. Consequently, this Court "has recognized, ever since *Fletcher v. Peck*, [6 Cranch 87, 130-31 (1810),] that judicial inquiries into legislative or executive motivation represent a substantial intrusion into the workings of other branches of government." *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 268 n.18 (1977); *see also Washington v. Trump*, 858 F.3d 1168, 1174 (9th Cir. 2017) (Kozinski, J., dissenting from denial of rehearing en banc). The Court has therefore permitted a discriminatory-purpose analysis of government action in only a "very limited and well-defined class of cases." *City of Columbia v. Omni Outdoor Advert., Inc.*, 499 U.S. 365, 377 n.6 (1991).

Even when it has permitted a discriminatory-purpose analysis of government action, this Court has concomitantly stated that any such analysis proceeds under an exacting standard. As Chief Justice Marshall explained for the Court over two centuries ago in *Fletcher*, government action can be declared unconsti-

tutional only upon a "clear and strong" showing. 6 Cranch at 128.

The Court has thus repeatedly explained, in various contexts, that courts can override facially neutral government actions as pretext only upon clear proof. For example:

- When there are "legitimate reasons" for government action, courts "will not infer a discriminatory purpose." *McCleskey v. Kemp*, 481 U.S. 279, 298-99 (1987) (rejecting equal-protection claim).
- A law's impact does not permit "the inference that the statute is but a pretext" when the classification drawn by a law "has always been neutral" as to a protected status, and the law is "not a law that can plausibly be explained only as a [suspect class]-based classification." *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 272, 275 (1979) (rejecting equal-protection claim); *see Arlington Heights*, 429 U.S. at 269-71; *Washington v. Davis*, 426 U.S. 229, 245-48 (1976).
- Only the "clearest proof" will suffice to override the stated intent of government action, to which courts "defer." *Smith v. Doe*, 538 U.S. 84, 92 (2003) (rejecting ex-post-facto claim); *see Flemming v. Nestor*, 363 U.S. 603, 617 (1960) (citing *Fletcher*, 6 Cranch at 128).
- "[Unless] an understanding of official objective emerges from readily discoverable fact, without any judicial psychoanalysis of a drafter's heart of hearts," judicial inquiry into purpose may make

little "practical sense." *McCreary Cty.*, 545 U.S. at 862.

This exacting standard for a discriminatory-purpose challenge to facially neutral government action exists for good reason. It ensures that a purpose inquiry will remain judicial in nature, safeguarding against a devolution into policy-based reasoning that elevates views about a perceived lack of policy merit into findings of illicit purpose. Even when an official adopts a different policy after criticism of an earlier proposal, critics can be quick to perceive an illicit purpose when they disagree with the final policy issued. *See Tenney v. Brandhove*, 341 U.S. 367, 378 (1951) ("In times of political passion, dishonest or vindictive motives are readily attributed ... and as readily believed."). The clearest-proof standard helps keep the Judiciary above that political fray.

B. The Order here, which classifies aliens by nationality and reflects national-security concerns, cannot be deemed a pretext for a religious test.

The Executive Order's travel restrictions classify aliens by nationality—not religion.[2] The Order's tempo-

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[2] Because the Executive Order classifies aliens by nationality, and not religion, any equal-protection analysis possibly applicable under the Constitution, *but see infra* Part III.A, subjects the Order to no more than rational-basis review. *See, e.g.*, *Mathews v. Diaz*, 426 U.S. 67, 83 (1976). In fact, decades-old nationality-based classifications are found throughout the INA. For example, Congress has authorized Temporary Protected Status for an "alien who is a national of a foreign state" specified by the Executive. 8 U.S.C. § 1254a(a)(1). Congress has also conferred certain

rary pause in entry by nationals from six countries and in the refugee program neither mentions any religion nor depends on whether affected aliens are Muslim. *See* EO §§ 2, 3, 6. These provisions distinguish among aliens only by nationality. *Id.*; *see also* Pet. Br. 70-73.

The Executive Order therefore is emphatically not a "Muslim ban." Numerous majority-Muslim countries in the world are not covered by the Executive Order, and data from the Pew-Templeton Global Religious Futures Project indicates that the six countries covered by the Executive Order contain only about 10% of the world's Muslims.[3]

The Order finds detriment to national interests from permitting "unrestricted entry into the United States of nationals of Iran, Libya, Somalia, Sudan, Syria, and Yemen." EO § 2(c). All six of these countries were already included in the list of seven "countries referred to in, or designated under, section 217(a)(12) of the INA, 8 U.S.C. [§] 1187(a)(12)." EO § 1(b)(i), (f). That set

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benefits on aliens from particular countries who are applying for LPR status. *See, e.g.*, *id.* § 1255 note (listing immigration provisions under the Haitian Refugee Immigration Fairness Act of 1998 and the Nicaraguan Adjustment and Central American Relief Act, among others). And Congress created a "diversity immigrant" program to issue immigrant visas to aliens from countries with historically low rates of immigration to the United States. *See id.* § 1153(c).

[3] *See Muslim Population by Country: 2010*, Pew-Templeton Global Religious Futures Project (last visited Aug. 17, 2017), http://www.globalreligiousfutures.org/religions/muslims (providing statistics on Muslim population as a percentage of total population on a per-country basis).

of seven countries under 8 U.S.C. § 1187(a)(12) was created by Congress and the Obama Administration, in administering the visa-waiver program, upon finding each to be a national-security "country or area of concern." 8 U.S.C. § 1187(a)(12)(A)(i)(III).

The Order then explains at length the rationale for ordering a pause in entry for nationals of the six covered countries. *See* EO §§ 1-2. Those restrictions have a manifest legitimate basis: to "ensure the proper review and maximum utilization of available resources for the screening and vetting of foreign nationals, [and] to ensure that adequate standards are established to prevent infiltration by foreign terrorists." EO § 2(c). The Order thus further directs that, while entry from those countries is paused, the Secretary of Homeland Security in consultation with the Secretary of State and Director of National Intelligence undertake a worldwide review to identify what information is needed from foreign countries to allow adequate screening of entrants. Then, the Secretary must submit reports to the President naming any country that these officials believe should be added to or removed from the list of countries subject to a suspension of entry. EO § 2(a)-(b), (d)-(g).

Moreover, before the current Administration took office, numerous federal officials—including the FBI Director,[4] the Director of National Intelligence,[5] and

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[4] H. Comm. on Homeland Sec., 114th Cong., *Nation's Top Security Officials' Concerns on Refugee Vetting* (Nov. 19, 2015), https://homeland.house.gov/press/nations-top-security-officials-concerns-on-refugee-vetting/.

[5] *Id.*

the Assistant Director of the FBI's Counterterrorism Division[6]—expressed concerns about the country's current ability to vet alien entry. According to the House Homeland Security Committee, ISIS and other terrorists "*are determined*" to abuse refugee programs,[7] and "groups like ISIS may seek to exploit the current refugee flows."[8] The national-security interests implicated by the ongoing War on Terror against radical Islamic terrorists have been recognized since the 2001 Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (codified at 50 U.S.C. § 1541 note).[9]

Given this national-security grounding, a challenge to the Executive Order as a pretext for religious dis-

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[6] Letter of Bob Goodlatte, Chairman, H. Comm. on the Judiciary, to Barack Obama, President of the United States of America (Oct. 27, 2015), http://judiciary.house.gov/_cache/files/20315137-5e84-4948-9f90-344db69d318d/102715-letter-to-president-obama.pdf.

[7] H. Comm. on Homeland Sec., 114th Cong., *Syrian Refugee Flows: Security Risks and Counterterrorism Challenges* 2-3 (Nov. 2015), https://homeland.house.gov/wp-content/uploads/2015/11/HomelandSecurityCommittee_Syrian_Refugee_Report.pdf.

[8] H. Comm. on Homeland Sec., 114th Cong., *Terror Threat Snapshot: The Islamist Terror Threat* (Nov. 2015), https://homeland.house.gov/wp-content/uploads/2015/11/November-Terror-Threat-Snapshot.pdf.

[9] *See, e.g.*, *Boumediene*, 553 U.S. at 733; *see also, e.g.*, National Defense Authorization Act for Fiscal Year 2016, Pub. L. No. 114-92, § 1035(a), 129 Stat. 726, 971 (2015) (codified at 10 U.S.C. § 801 note); The White House, *Report on the Legal and Policy Frameworks Guiding the United States' Use of Military Force and Related National Security Operations* 4-7 (Dec. 2016), https://www.justsecurity.org/wp-content/uploads/2016/12/framework.Report_Final.pdf.

crimination must fail. Ample reason exists for courts to leave undisturbed the delicate policy judgments inherent in the Executive Order, as these decisions must account for factors indicating a heightened national-security risk that warrants a particular course of action regarding the Nation's borders. Courts are not well situated to evaluate competing experts' views about particular national-security-risk-management measures. *See Boumediene*, 553 U.S. at 797; *AADC*, 525 U.S. at 491. When it comes to deciding the best way to use a sovereign's power over its borders to manage risk, courts have long recognized that the political branches are uniquely well situated. *E.g.*, *Mathews*, 426 U.S. at 81; *Harisiades v. Shaughnessy*, 342 U.S. 580, 588-89, 591 (1952).

Comments the President made during his campaign for office cannot overcome the combination of (1) the Order's detailed explanation of its national-security basis, (2) the legitimate basis for that reasoning in conclusions of numerous federal officials, *see supra* pp. 10-12, and (3) the exacting standard for deeming facially neutral government action pretext for a discriminatory purpose, *see supra* Part I.A; *see also* Pet. Br. 73-76. Furthermore, this Court has recognized the limited significance of campaign statements made before candidates assume the responsibilities of office. *See Republican Party of Minn. v. White*, 536 U.S. 765, 780 (2002); *see also Washington*, 858 F.3d at 1172-74 (Kozinski, J., dissenting from denial of rehearing en banc). And comments made by nongovernment officials are irrelevant for determining whether the Executive Branch took ac-

tion as a pretext for a prohibited, discriminatory purpose. *See Feeney*, 442 U.S. at 279.

II. The Executive Order Complies with the INA, so It Also Receives "the Strongest of Presumptions" of Validity Because It Is Within *Youngstown*'s First Category as Executive Action Pursuant to Power Delegated Expressly by Congress.

The Order also complies with Congress's statutory delegation of Executive power, so the Ninth Circuit should not have enjoined the Order as violating the INA. *See* Pet. App. 38-62. In fact, plaintiffs' discriminatory-purpose challenge to the Order faces yet another strong presumption of validity: the President's action here is accorded "the strongest of presumptions and the widest latitude of judicial interpretation." *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring), *quoted in Dames & Moore v. Regan*, 453 U.S. 654, 674 (1981). That is because the Order is within *Youngstown*'s first zone of executive action: Congress expressly delegated to the President the authority he exercised here. The burden of persuasion for plaintiffs' constitutional challenges will therefore "rest heavily upon" plaintiffs, as the parties challenging the President's *Youngstown*-zone-one action. *Id.*

A. Pursuant to Congress's statutory immigration scheme, the Executive Order temporarily suspends the entry into the United States of two classes of aliens:

- nationals of six listed countries, if they are not lawful permanent residents (LPRs) of the United States, were outside this country ten days after the Executive Order issued, and do not qualify

for other exceptions (such as holding a valid visa ten days after the Executive Order issued); and

- aliens seeking entry under the U.S. Refugee Admissions Program.

EO §§ 2, 3, 6(a). The Executive Order also caps the entry of refugees at 50,000 for Fiscal Year 2017. *Id.* § 6(b). This Executive Order exercises authority that Congress expressly delegated.

1. "Courts have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control." *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 210 (1953). Congress too has recognized this sovereign power to exclude aliens, giving the President broad discretion to suspend the entry of any class of aliens:

> *Whenever* the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, *he may by proclamation*, and *for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens* as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate.

8 U.S.C. § 1182(f) (emphases added). It is unlawful for an alien to enter the country in violation of "such limitations and exceptions as the President may prescribe." *Id.* § 1185(a)(1).

In addition to the President's broad § 1182(f) power to suspend the entry of aliens, Congress also provided

that the Executive "may at any time, in [its] discretion," revoke a visa. *Id.* § 1201(i). Such a discretionary visa revocation is judicially unreviewable except in one narrow circumstance: in a removal proceeding (as opposed to an entry denial), if the "revocation provides the sole ground for removal." *Id.*

And, as to refugees, the President's power to limit alien admission is authorized, not only by § 1182(f), but also by the INA's separate delegation to the President of power to control refugee admissions. *Id.* § 1157(a)(2) (refugee admissions capped at "such number *as the President determines*," after certain congressional consultation, "is justified by humanitarian concerns *or is otherwise in the national interest*" (emphases added)).

2. Any challenge to congressional authorization for the Order's nationality-based suspension of entry under § 1182(f) founders on this Court's decision in *Sale*, 509 U.S. at 187-88. *Sale* held—in terms equally applicable here—that no "judicial remedy" exists to override the Executive's use of its § 1182(f) power to deny entry to specified classes of nonresident aliens. *Id.* at 188 (quoting *Haitian Refugee Center v. Gracey*, 809 F.2d 794, 841 (D.C. Cir. 1987) (Edwards, J., concurring in part and dissenting in part)).

Sale is fatal to any claim that the Order here is unauthorized by the INA. *Sale* held it "perfectly clear that 8 U.S.C. § 1182(f) . . . grants the President ample power to establish a naval blockade that would simply deny illegal Haitian migrants the ability to disembark on our shores." *Id.* at 187. The Court rejected the argument that a later-enacted statutory provision limits the President's power under § 1182(f) to suspend aliens' entry

into the United States, reasoning that it "would have been extraordinary for Congress to make such an important change in the law without any mention of that possible effect." *Id.* at 176.

Likewise here. The Ninth Circuit panel erred in deciding that "[t]here is no sufficient finding in [the Order] that the entry of the excluded classes would be detrimental to the interests of the United States." *Hawaii v. Trump*, 859 F.3d 741, 770 (9th Cir. 2017) (per curiam). The President need not even disclose his "reasons for deeming nationals of a particular country a special threat," *AADC*, 525 U.S. at 491, let alone to a court's satisfaction. Even when the President does disclose his reasons for deeming certain nationals to present a risk to national security, courts are "ill equipped to determine their authenticity and utterly unable to assess their adequacy." *Id.*

In all events, the Executive Order provides extensive findings supporting the need for a temporary pause in entry to assess whether several failed states, or governments that are state sponsors of terrorism, provide adequate information about their nationals to permit national-security vetting. EO § 1(d)-(f). Specifically:

> Each of these countries is a state sponsor of terrorism, has been significantly compromised by terrorist organizations, or contains active conflict zones. Any of these circumstances diminishes the foreign government's willingness or ability to share or validate important information about individuals seeking to travel to the United States. Moreover, the significant presence in each of these countries of terrorist organizations,

> their members, and others exposed to those organizations increases the chance that conditions will be exploited to enable terrorist operatives or sympathizers to travel to the United States. Finally, once foreign nationals from these countries are admitted to the United States, it is often difficult to remove them, because many of these countries typically delay issuing, or refuse to issue, travel documents.

EO § 1(d). "[W]hen it comes to collecting evidence and drawing factual inferences" regarding determinations such as these, "the lack of competence on the part of the courts is marked, and respect for the Government's conclusions is appropriate." *Humanitarian Law Project*, 561 U.S. at 34.[10]

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[10] The Ninth Circuit's additional holding that the Executive Order's refugee-admission restrictions lacked sufficient findings, *Hawaii*, 859 F.3d at 774-76, was wrong for similar reasons. Section 6(a) of the Order (pausing refugee admissions) is based on findings that "[t]errorist groups have sought to infiltrate several nations through refugee programs" and that "more than 300 persons who entered the United States as refugees are currently the subjects of counterterrorism investigations by the Federal Bureau of Investigation," some of whom have been "convicted of terrorism-related crimes." EO § 1(b)(iii), (h). Section 6(b) of the Order (capping refugee admissions) is justified based on the President's finding "that the entry of more than 50,000 refugees in fiscal year 2017 would be detrimental to the interests of the United States." Even if the President had offered additional detail, courts would be ill-equipped to review it. *See AADC*, 525 U.S. at 491. And where such preventative measures are involved, the President "is not required to conclusively link all the pieces in the puzzle before [courts] grant weight to its empirical conclusions." *Humanitarian Law Project*, 561 U.S. at 35.

3. Nor is Congress's broad delegation of authority to suspend the entry of classes of aliens undermined by 8 U.S.C. § 1152(a)(1)(A), which makes no mention of § 1182(f). Section 1152(a)(1)(A) does not address the entry of aliens into the country at all. Instead, it is part of a set of restrictions on the issuance of *immigrant visas*—that is, permission for aliens to seek admission for permanent residence. *See* 8 U.S.C. §§ 1101(a)(15)-(16), 1151(a)-(b), 1181(a). Added in the Immigration and Nationality Act of 1965, which abolished an earlier nationality-based quota system for allocating immigrant visas, § 1152(a)(1)(A) provides:

> Except as specifically provided [elsewhere in the INA], no person shall receive any preference or priority or be discriminated against in the issuance of an immigrant visa because of the person's race, sex, nationality, place of birth, or place of residence.

Section 1152(a)(1)(A) does not conflict with § 1182(f) or impliedly restrict nationality-based denials of entry under § 1182(f). *See Sale*, 509 U.S. at 176; *see also Posadas v. Nat'l City Bank of N.Y.*, 296 U.S. 497, 503 (1936) (describing conflict requirement for repeal by implication). An alien's *entry* into this country is a different and much more consequential event than the preliminary step of receiving a *visa*, which merely entitles the alien to apply for admission into the country. *See* 8 U.S.C. §§ 1101(a)(4), 1181, 1182(a), 1184. Visa possession does not control or guarantee entry; the INA provides several ways in which visa-holding aliens can be denied entry. *E.g.*, 8 U.S.C. §§ 1101(a)(13)(A), 1182(a), (f), 1201(h), (i); 22 C.F.R. §§ 41.122, 42.82. One of them

is the President's express authority under § 1182(f) to suspend the entry of classes of aliens.

This design of the INA has been repeatedly recognized in past practice. For example, over 30 years ago, the President suspended the entry of Cuban nationals as immigrants, subject to certain exceptions. Presidential Proclamation No. 5517, 51 Fed. Reg. 30,470 (Aug. 26, 1986); *see also Int'l Refugee Assistance Project v. Trump*, 857 F.3d 554, 648 & n.2 (4th Cir. 2017) (en banc) (Niemeyer, J., dissenting) (citing additional examples). Plaintiffs point to no instance in which the government has read § 1152(a)(1)(A)'s visa-allocation provisions as prohibiting nationality-based suspensions of entry under § 1182(f).

Finally, § 1152(a)(1)(A) applies only to *immigrant* visas, and does not cover other prospective entrants, such as those seeking *nonimmigrant* visas. So, even on plaintiffs' view, this section cannot possibly establish that § 2 of the Order is statutorily unauthorized as applied to aliens seeking entry as nonimmigrants.[11]

4. The President's § 1182(f) authority to suspend aliens' entry is not at all limited by 8 U.S.C. § 1182(a), which also makes no mention of § 1182(f). *Cf. Int'l Refugee Assistance Project*, 857 F.3d at 614 (Wynn, J., concurring) (addressing plaintiffs' § 1182(a) arguments because "[t]he majority opinion does not reach the merits of Plaintiffs' claim that Section 2(c)'s suspension on en-

[11] Similarly, refugee admission does not require an immigrant visa. *See* 8 U.S.C. § 1181(c). So § 1152(a)(1)(A)'s provisions regarding immigrant-visa issuance, even on plaintiffs' view, cannot show that Congress somehow withheld authority for the refugee-program directives in § 6 of the Order.

try violates the Immigration Act . . . ."); *Hawaii*, 859 F.3d at 781-82 (noting but not ruling on this argument based terrorism-related inadmissibility on 8 U.S.C. § 1182(a)(3)).

In § 1182(a), Congress enumerated no fewer than seventy grounds that make an alien automatically inadmissible to this country, unless an exception applies. Congress did not provide that these are the only grounds on which the Executive can deny aliens entry. Instead, Congress in § 1182(f) separately enabled the President to impose additional entry restrictions, including the power to "suspend the entry" of "any class of aliens" for "such period as he shall deem necessary."

As the District of Columbia Circuit correctly recognized in *Abourezk v. Reagan*, 785 F.2d 1043 (D.C. Cir. 1986), § 1182(f) permits the Executive to deny aliens entry even if the aliens are not within one of the enumerated § 1182(a) categories that automatically make aliens inadmissible: "The President's sweeping proclamation power [in § 1182(f)] thus provides a safeguard against the danger posed by any particular case or class of cases that is not covered by one of the categories in section 1182(a)." *Id.* at 1049 n.2. The *Abourezk* court even noted an example of this understanding in a nationality-based § 1182(f) proclamation issued by President Reagan, which suspended entry for "officers or employees of the Cuban government or the Cuban Communist Party." *Id.* (citing Presidential Proclamation No. 5377, 50 Fed. Reg. 41,329 (Oct. 10, 1985)).

5. Nor are the Executive Order's refugee-admission provisions contrary in any way to 8 U.S.C. § 1157. *See Hawaii*, 859 F.3d at 775-76. Refugee admis-

sions are *capped* at a number determined by the President. *See supra* p. 16. Section 1157 contemplates that, after certain congressional consultation, the President will set a *ceiling* for refugee admissions at the beginning of each year, but the provision contains no requirement the President actually allow that number of refugees to be admitted. Section 1157 provides a mechanism for the President to seek an increase in the number of refugees that may be admitted in a given year based on certain unforeseen circumstances. 8 U.S.C. § 1157(b). But determining the maximum number of aliens that "may be" admitted in a fiscal year in no way sets a minimum floor for refugee admissions, let alone one that conflicts with the President's separate authority to restrict the entry of aliens when doing so is "detrimental to the interests of the United States." *Id.* § 1182(f).

B. Because the Executive Order is an exercise of power delegated by Congress in the INA, it is executive action in the first *Youngstown* zone. The Order is therefore also "supported by the strongest of presumptions and the widest latitude of judicial interpretation." *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring), *quoted in Dames & Moore*, 453 U.S. at 674. Overcoming this strongest presumption for any claim challenging the Executive Order is a burden that rests "heavily" on plaintiffs. *Id.*[12]

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[12] The Ninth Circuit panel professed that it was "cognizant" of this framework, *Hawaii*, 859 F.3d at 782, but found the President's power at its "lowest ebb," under *Youngstown*'s third zone of executive action that runs contrary to Congressional authorization, *id.* (quoting *Youngstown*, 343 U.S. at 637 (Jackson, J.,

Plaintiffs' significant burden is well-founded here, not only because of the explicit congressional grant of authority to *deny* entry, 8 U.S.C. § 1182(f), but also because of the INA's complementary approach to *allowing* entry. Specifically, Congress enacted "extensive and complex" provisions detailing how over forty different classes of nonimmigrants, refugees, and other aliens can attain lawful presence in the country. *Arizona*, 567 U.S. at 395; *see Texas v. United States*, 809 F.3d 134, 179 (5th Cir. 2015), *aff'd by an equally divided court*, 136 S. Ct. 2271 (2016) (per curiam). But while Congress imposed these detailed criteria to significantly restrict the Executive's ability to unilaterally *allow* aliens to be lawfully present in the country, Congress simultaneously provided the Executive broad authority to *exclude* aliens from the country, under § 1182(f).

The President's authority in this context therefore "includes all that he possesses in his own right plus all that Congress can delegate." *Youngstown*, 343 U.S. at 635 (Jackson, J., concurring), *quoted in Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 375 (2000), *and Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2083-84 (2015). The injunctions here are thus remarkable for interfering with a decision authorized by two branches of government. And they do so in a particularly sensitive area. The admission of aliens into this country is a federal prerogative "inherent in sovereignty, necessary for maintaining normal international relations and defending the country against foreign en-

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concurring)). That conclusion is incorrect for the reasons explained above.

croachments and dangers—a power to be exercised exclusively by the political branches of government." *Mandel*, 408 U.S. at 765 (quotation marks omitted); *accord United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542 (1950).

Plaintiffs' claim that the Order is pretext for a religious classification thus fails for this additional reason that the Order is within *Youngstown*'s first zone. And the Order is already accorded the heavy presumption that facially neutral government action is valid and taken in good faith. *See supra* Part I.A.

Especially with those presumptions in mind, the Executive provided a "facially legitimate and bona fide reason" for exercising 8 U.S.C. § 1182(f) national-security and foreign-affairs powers to restrict entry. *Mandel*, 408 U.S. at 770; *see also Kerry v. Din*, 135 S. Ct. 2128, 2140-41 (2015) (Kennedy, J., concurring in the judgment) (federal government official informing alien of visa denial based expressly on statutory provision is a "facially legitimate and bona fide" reason under *Mandel*). Courts therefore must "neither look behind the exercise of that discretion, nor test it by balancing its justification against" plaintiffs' asserted constitutional rights. *Mandel*, 408 U.S. at 770.

III. The Constitutional Provisions Invoked by Plaintiffs Do Not Extend Extraterritorially, Nonresident Aliens Abroad Possess No Constitutional Rights Regarding Entry into this Country, and the Executive Order Provides All Process that Could Possibly Be Due.

Neither court below enjoined the Order on a procedural-due-process theory. Any such theory, turning on whether a nonresident alien abroad has a sufficient connection to the United States, does not justify any injunction of the Executive Order. That is because the constitutional provisions on which plaintiffs rely do not apply extraterritorially. And even if they do, the Executive Order provides all process that is possibly due by giving facially neutral, bona fide national-security grounds for its restrictions. *See* Pet. Br. 65-66. At a minimum, the injunctions must be narrowed to allow entry only to foreign nationals with a "credible claim of a bona fide relationship with a person or entity in the United States." *IRAP*, 137 S. Ct. at 2088.

A. The constitutional claims here are fundamentally untenable because the constitutional provisions that plaintiffs invoke are inapplicable to the nonresident aliens abroad covered by the Executive Order.

1. Nonresident aliens outside territory under clear United States control possess no constitutional rights regarding the terms on which they may enter the country: It is "clear" that "an unadmitted and nonresident alien" "ha[s] no constitutional right of entry to this country as a nonimmigrant or otherwise." *Mandel*, 408 U.S. at 762. The "power to admit or exclude aliens is a sovereign prerogative," and aliens seeking admission to

the United States request a "privilege." *Landon v. Plasencia*, 459 U.S. 21, 32 (1982).

Consequently, the Fifth Amendment's Due Process Clause provides no "judicial remedy" to override the President's 8 U.S.C. § 1182(f) power to deny classes of nonresident aliens entry. *Sale*, 509 U.S. at 188; *see id.* ("agree[ing] with the conclusion expressed in Judge Edwards' concurring opinion" regarding statutory and constitutional challenges in *Gracey*, 809 F.2d at 841: "'there is *no solution to be found in a judicial remedy*'" overriding the Executive's exercise of § 1182(f) authority (emphasis added)).

This Court has long "rejected the claim that aliens are entitled to Fifth Amendment rights outside the sovereign territory of the United States." *United States v. Verdugo-Urquidez*, 494 U.S. 259, 269 (1990) (citing *Johnson v. Eisentrager*, 339 U.S. 763, 784 (1950)). Rather, the Due Process Clause applies only "within the territorial jurisdiction." *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886).

The Constitution does not regulate immigration policy regarding foreign nationals who are neither resident nor present in United States territory. The Court has therefore recognized a key distinction between aliens inside versus outside the United States, according the former certain constitutional rights while not extending those rights to the latter. *See Zadvydas v. Davis*, 533 U.S. 678, 693 (2001).

Boumediene, 553 U.S. at 732-33, is not to the contrary. That case involved the lengthy detention of alien enemy-combatants at the U.S. Naval Station at Guantanamo Bay and, therefore, implicated habeas corpus

and the Suspension Clause, the history of which the Court detailed. *See id.* at 739-52. The federal government here is merely denying entry into the country, not engaging in lengthy detention. *Cf. id.* at 797 ("[F]ew exercises of judicial power are as legitimate or as necessary as the responsibility to hear challenges to the authority of the Executive to imprison a person"). And unlike Guantanamo Bay, the United States lacks "plenary control, or practical sovereignty" over the seven countries in the Executive Order's travel restriction—or from the various countries where the refugee directive would apply. *Id.* at 754; *cf. id.* at 764 ("The United States has maintained complete and uninterrupted control of the bay for over 100 years.").

2. Plaintiffs' challenges fare no better when framed as claims that the Executive Order violates rights against religious discrimination under the equal-protection component of the Fifth Amendment's Due Process Clause and under the Establishment Clause. *See* First Am. Compl. ¶¶ 220-25, *Int'l Refugee Assistance Project v. Trump*, No. 8:17-cv-361, Docket entry No. 93 (D. Md. Mar. 10, 2017); Second Am. Compl. ¶¶ 111-17, *Hawaii v. Trump*, No. 1:17-cv-50, Docket entry No. 64 (D. Haw. Mar. 8, 2017). Plaintiffs' theory is the same as to both Clauses—that the Executive Order is a pretext for discrimination on account of religion. But that theory fails because nonresident aliens seeking to enter the country lack constitutional rights regarding entry in the first place. *See supra* pp. 25-26.

What is more, Congress has repeatedly designated members of certain religious groups—such as Soviet Jews, Evangelical Christians, and members of the

Ukrainian Orthodox Church—as presenting "special humanitarian concern to the United States" for immigration purposes. 8 U.S.C. § 1157(a)(3) & note; *see* Department of State, Foreign Operations, and Related Programs Appropriations Act, 2016, Pub. L. No. 114-113, div. K, § 7034(k)(8)(A), 129 Stat. 2705, 2765 (2015) (reauthorizing this designation). That accepted practice underscores the inapplicability in this context of the religious-nondiscrimination rights invoked by plaintiffs.

Plaintiffs cannot make an end-run around the territorial limits on constitutional rights by relying on the alleged stigmatizing effect on individuals within the United States of a challenged decision about whether *nonresident aliens outside* this country are admitted. To hold otherwise would allow bootstrapping a constitutional claim based on government action regulating only aliens beyond constitutional protection. Amici are aware of no instance, outside the present context, in which a U.S. citizen or alien resident in this country prevailed on an Establishment Clause claim based on the stigma allegedly perceived by how the government treated *other* persons who possessed no constitutional rights regarding entry. *Cf. Lamont v. Woods*, 948 F.2d 825, 827, 843 (2d Cir. 1991) (allowing an Establishment Clause claim to proceed based on the unique taxpayer-standing doctrine in a challenge to the expenditure of government funds in foreign countries).

B. Even if the constitutional provisions at issue could somehow apply extraterritorially, there is still no constitutional violation from the Executive Order's limits on the entry of nonresident aliens abroad. *Cf.* Second Am. Compl. ¶¶ 118-26 (Hawaii plaintiffs' substantive-

and procedural-due-process claims). Plaintiffs' Fifth Amendment claim would thus fail for this reason as well.

1. There can be no Fifth Amendment violation if one is not deprived of a constitutionally protected interest in life, liberty, or property. *E.g.*, *Swarthout v. Cooke*, 562 U.S. 216, 219 (2011) (per curiam); *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 59 (1999). And nonresident aliens abroad have no constitutionally protected interest in entering the United States.[13] *See Mandel*, 408 U.S. at 762. Even apart from the issue of entry into the United States, "[t]here is no constitutionally protected interest in either obtaining or continuing to possess a visa." *Louhghalam v. Trump*, 230 F. Supp. 3d 26, 35 (D. Mass. 2017). Similarly, multiple courts of appeals have rejected due-process claims regarding visa issuance or processing. *See, e.g.*, *Legal Assistance for Vietnamese Asylum Seekers v. Dep't of State, Bureau of Consular Affairs*, 104 F.3d 1349, 1354 (D.C. Cir. 1997); *Azizi v. Thornburgh*, 908 F.2d 1130, 1134 (2d Cir. 1990); *De Avilia v. Civiletti*, 643 F.2d 471, 477 (7th Cir. 1981). Thus, plaintiffs lack support for the notion that aliens have due-process claims to advance.

2. In *Washington v. Trump*, 847 F.3d 1151 (9th Cir. 2017) (per curiam), a separate panel of the Ninth Circuit posited that several categories of aliens, other than lawful permanent residents, may have "potential"

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[13] The analysis could be different for certain lawful permanent residents who are returning to the country from abroad, *see Landon*, 459 U.S. at 33-34, but the Executive Order does not apply to LPRs, *see supra* p. 14.

claims to constitutional protections regarding travel and entry. *Id.* at 1166. That suggestion was incorrect because the four categories of aliens cited by the Ninth Circuit lack valid constitutional claims.[14]

First, there are no constitutional rights regarding prospective *entry* for aliens who are in the United States "unlawfully." *Id.* The INA provides that visas issued to aliens seeking admission to the country confer no entitlement to be admitted, and that visas can be revoked at any time in the Executive's discretion. 8 U.S.C. § 1201(h)-(i). Even as to an alien who was admitted into the country under a visa, "revocation of an entry visa issued to an alien already within our country has no effect upon the alien's liberty or property interests," and thus cannot support a due-process challenge. *Knoetze v. U.S. Dep't of State*, 634 F.2d 207, 212 (5th Cir. 1981).

If *removal proceedings*—which involve the distinct situation of potential detention and forcible removal—were instituted against an alien who is in this country and whose visa was revoked, that alien would enjoy cer-

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[14] The *Washington* panel erroneously concluded that the Executive was unlikely to succeed in appealing a district court order enjoining the prior Executive Order on the basis that it violated the Due Process Clause. 847 F.3d at 1164-65. That conclusion is wrong because no process is due if one is not deprived of a constitutionally protected interest in life, liberty, or property, and nonresident aliens abroad have no constitutionally protected interest in entering the United States. *See supra* pp. 25-26. Regardless, whatever process could possibly be due was satisfied here by the Executive Order's "facially legitimate" public proclamation prospectively announcing an exercise of the Executive's § 1182(f) authority. *See infra* pp. 34-35.

tain due-process protections under the Fifth Amendment. *See Demore v. Kim*, 538 U.S. 510, 523 (2003) (noting that it is "well established" that aliens have due-process rights in deportation hearings); *see also Zadvydas*, 533 U.S. at 693 (alien entitled to Fifth Amendment protections once alien is within the country). Accordingly, the INA provides for judicial review of visa revocations only in the limited context of deportation proceedings. 8 U.S.C. § 1201(i). But this case is not about deportation—it is about preventing nonresident aliens abroad from entering the country in the first place.[15] The Court has never held that the Fifth Amendment is violated when restrictions are placed on nonresident aliens abroad seeking to enter the country. *Cf. Landon*, 459 U.S. at 32. And because visas can be revoked unilaterally and often without judicial review, *see* 8 U.S.C. § 1201(i), it does not follow that the Constitution requires protections for aliens seeking to leave and then re-enter the country.

Second, this Executive Order does not cover any nonresident alien visa holders who travelled internationally and are attempting to reenter the country. The Executive Order applies only to aliens who were outside the United States on the effective date of the Order, who did not have a valid visa as of January 27, 2017, and

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[15] This claim is particularly weak for unlawfully present aliens. Even if unlawfully-present aliens have due-process rights in *removal proceedings*, *see Zadvydas*, 533 U.S. at 693, that does not mean that an unlawfully-present alien who leaves the country has a right to process to be admitted to the country upon return. *See, e.g.*, 8 U.S.C. § 1182(a)(9)(B) (inadmissibility based on prior unlawful presence), (f).

who did not have a valid visa on the effective date of the Order. EO § 3(a). Regardless, *Landon* does not establish that "non-immigrant visaholders" have due-process rights when seeking to return from abroad. *See Washington*, 847 F.3d at 1166 (citing *Landon*, 459 U.S. at 33-34). *Landon* involved a *resident* alien, and suggested that any process due must account for the circumstances of an alien's ties to this country. *See* 459 U.S. at 32-34 ("[O]nce an alien gains admission to our country and begins to develop the ties that go with permanent residence his constitutional [due-process] status changes accordingly.... The constitutional sufficiency of procedures provided in any situation, of course, varies with the circumstances."). Those ties are significantly less in the case of a *nonresident* alien who was temporarily admitted on a nonimmigrant visa. In any event, *Landon* was decided before Congress changed the nature of an alien's interest in visa possession by amending the INA, in 2004, to provide that "[t]here shall be no means of judicial review ... of a revocation" of a visa, "except in the context of a removal proceeding if such revocation provides the sole ground for removal under" the INA. Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, § 5304(a), 118 Stat. 3638, 3736 (codified at 8 U.S.C. § 1201(i)).

Third, there are no viable due-process claims for aliens abroad seeking refugee status. *See Washington*, 847 F.3d at 1166. That argument morphs statutory protections for those seeking asylum into constitutional protections for refugees. The INA's conferral of statutory rights to seek asylum, *see* 8 U.S.C. § 1158, cannot create constitutionally protected rights for refugee ad-

mission. Asylum and refugee admission are not the same thing. The INA's asylum protection can be sought by individuals who are already "physically present in the United States or who arrive[] in the United States." 8 U.S.C. § 1158(a)(1). Only an alien *outside* the United States may apply to be admitted as a refugee. *See id.* §§ 1101(a)(42), 1157(a), 1158(a), (c)(1), 1181(c). Hence, § 1182(f) independently permits the Executive to deny refugee applicants entry into the United States. Similarly, statutory provisions under the United Nations Convention Against Torture (CAT) provide that certain aliens may not be returned to a country in which they fear torture, "regardless of whether the person is physically present in the United States." 8 U.S.C. § 1231 note. The CAT provisions, however, merely limit the possible countries to which an alien can be *returned* and say nothing about overriding the President's statutory authority to restrict alien *entry* into the United States, even if aliens cannot be returned to a certain other country. *See id.* § 1182(f).[16]

Fourth, plaintiffs lack viable due-process arguments based on visa applicants who have a relationship with a U.S. resident or institution. *See Washington*, 847 F.3d at 1166 (citing *Din*, 135 S. Ct. at 2139 (Kennedy, J., concurring in the judgment); *id.* at 2142 (Breyer, J., dissenting); *Mandel*, 408 U.S. at 762–65. *Din* did not hold

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[16] These arguments are particularly weak here since the Executive Order's revised entry restrictions do not even apply to "any foreign national who has been granted asylum; any refugee who has already been admitted to the United States; or any individual who has been granted withholding of removal, advance parole, or protection under the Convention Against Torture." EO § 3(b)(vi).

that such due-process rights exist. To the contrary, the narrowest opinion concurring in the judgment in *Din* expressly did not decide whether a U.S. citizen has a protected liberty interest in the visa application of her alien spouse, such that she was entitled to notice of the reason for the application's denial. *See* 135 S. Ct. at 2139-41 (Kennedy, J., concurring in the judgment); *see also* Pet. Br. 67-68. In fact, the concurrence reasoned that, even if due process applied in this context, the only process possibly required was that the Executive give a "facially legitimate and bona fide reason" for denying a visa to an alien abroad. *Id.* at 2141; *see also id.* at 2131 (plurality op.) ("[A]n unadmitted and nonresident alien . . . has no right of entry into the United States, and no cause of action to press in furtherance of his claim for admission.").

And the *Din* concurrence's standard is plainly met here by the Order's lengthy recitation of national-security reasons. *See* EO § 1(d)-(h). The Order therefore already provides whatever process may be due, as it publicly announces the "facially legitimate and bona fide" invocation of the President's 8 U.S.C. § 1182(f) national-security and foreign-affairs powers to restrict entry. *Mandel*, 408 U.S. at 770.

C. Regardless, the existence of occasional scenarios like that in *Din*—of nonresident aliens abroad with sufficiently strong connections to the United States—could not possibly support the lower courts' facial injunctions, even if some additional process were due in these limited situations.

At the very minimum, the Constitution cannot extend rights to nonresident aliens abroad who have no

other connection to the country. Such a holding would extend constitutional rights to every person on the planet. That point alone is fatal to plaintiffs' facial challenge.

Even if there were some entitlement to more process than the Executive Order's public recitation of reasons supporting its entry restrictions, the only possible remedy would be what this Court ordered in its stay opinion. The Order cannot be enjoined as applied to "foreign nationals abroad who have no connection to the United States at all." *IRAP*, 137 S. Ct. at 2088. Thus, at a minimum, the Court should narrow the injunction to apply only to foreign nationals with a "credible claim of a bona fide relationship with a person or entity in the United States"—such as "a close familial relationship," or a relationship with an entity that is "formal, documented, and formed in the ordinary course, rather than for the purpose of evading [the Executive Order]." *Id.*

CONCLUSION

The judgments of the courts of appeals should be reversed.

Respectfully submitted.

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